1956 *Present :* **Basnayake, A.C.J., and Pulle, J.**

DE SILVA, Appellant, *and* ILANGAKOON, Respondent

S. C. 147—D. C. Kurunegala, 7,355/M

Action against public officer—Notice of action—Procedure—Malice alleged in plaint—Is notice necessary then ?—Civil Procedure Code, s. 461.

In an action against a public officer in respect of an act purporting to be done by him in his official capacity, the requirements of section 461 of the Civil Procedure Code should be strictly observed and the notice which should be given to the defendant should be in the form prescribed in the Schedule to the Code. A letter of demand written to the defendant by the plaintiff's Proctor does not satisfy the requirements of section 461.

Where malice was alleged against the defendant in an action for defamation instituted against a public officer in respect of a statement purporting to be made by him in his official capacity—

Held, that the allegation of malice in the plaint did not exempt the plaintiff from his duty to give the defendant due notice of the action in conformity with the requirements of section 461 of the Civil Procedure Code.

APPEAL from a judgment of the District Court, Kurunegala.

H. V. Perera, Q.C., with *E. A. G. de Silva* and *D. R. P. Goonetilleke,* for Defendant-Appellant.

N. E. Weerasooria, Q.C., with *G. T. Samarawickrema,* for Plaintiff-Respondents.

Cur. adv. vult.

May 2, 1956. BASNAYAKE, C.J.—

The defendant-appellant (hereinafter referred to as the appellant) is the Headmaster of a Government School. He has been sued by the plaintiff-respondent, a minor, by his next friend, his father (hereinafter referred to as the respondent), in damages alleged to have been suffered by him in consequence of a defamatory statement made by the appellant in the School Leaving Certificate granted to the respondent. The alleged defamatory statement was made in a document which the appellant had to complete in his capacity as Principal of the School and hand over to the legal guardian of the respondent when the pupil left the School, and is as follows : " Conduct extemely bad."

The learned trial judge held against the appellant and entered judgment for the respondent in a sum of Rs. 5,000 with costs in that class.

The appellant submits that the respondent is not in law entitled to maintain the action as he has failed to comply with the terms of section 461 of the Civil Procedure Code. That section provides that no action

shall be instituted against a public officer in respect of any act purporting to be done by him in his official capacity, until the expiration of one month next after notice in writing has been delivered to such officer stating the cause of action and the name and place of abode of the person intending to institute the action and the relief which he claims. It also requires that the plaint in such an action must contain a statement that such notice has been delivered.

Learned counsel for the appellant contends that the requirements of that section are imperative.

Learned counsel for the respondent contends that the notice required by section 461 has been given and refers us to a letter by Perera & Perera, the respondent's Proctors, which is to the following effect :—

27th January 1951

L. B. J. de Silva Esq.,
Principal, Govt. School,
Uhumiya.

Dear Sir,

We have been instructed by our Mr. I. M. P. B. Ilangakoon, Village Headman, Uhumiya, Palata, as Guardian of his minor son Ilangakoon to demand of you the immediate payment of the sum of Rs. 15,000 being damages occasioned by your false and malicious endorsement in the leaving certificate of the said Banda Ilangakoon dated 12th January 1951. Should you fail to comply with this demand on or before the 6th February 1951 we have further instructions to sue you at law to recover the said damages.

Sgd. Perera & Perera.

The Schedule to the Civil Procedure Code prescribes the form of notice of action. That form provides that it should be addressed to the public officer concerned and it reads thus :—

" Take notice that I, ... A. B. . . . of . . . am about to institute an action against you in your official capacity as . . . . for . . . . (state the cause of action and the relief claimed) . . . .

Sgd. . . . . ."

Now in the instant case the document which the respondent claims is a notice of action is not in the prescribed form, nor does it purport to be a notice of action. It is a demand of payment by the Proctors for the respondent with an indication that they have instructions to sue the appellant at law to recover the damages if they are not paid. That the respondent never intended the letter which his Proctors wrote to the appellant demanding the payment of damages to be a notice of action under section 461 of the Civil Procedure Code is apparent from the fact

that in his plaint he did not plead as required by section 461 that the notice required by that section had been given to the appellant. When the appellant in his amended answer took the objection that the action cannot be maintained as the respondent had failed to give the prescribed notice, the respondent filed replication denying that any notice under section 461 of the Civil Procedure Code was necessary in the circumstances of this case.

The notice under section 461 of the Civil Procedure Code is a condition precedent to the institution of an action against a public officer in respect of any act purporting to be done by him in his official capacity. The requirements of that section should be strictly observed and the notice should be in the form prescribed in the Schedule to the Code. The notice should indicate to the recipient that the communication is meant to be a notice under that section and inform him of all the particulars that are required to be stated in such notice. The letter which the respondent's counsel now claims is a notice of action does not satisfy the requirements of section 461. Procedural provisions such as these are imperative and failure to observe them is fatal to an action.

In the case of *Thampoe v. Murukasu* [1] it has been held that the failure to observe the requirements of section 461 absolutely debars a Court from entertaining a suit instituted without compliance of those provisions.

Learned counsel for the respondent also argued that in this case no notice was necessary as there was an allegation of malice and *mala fides* in the plaint. He submitted that there is a long line of decisions of this Court which lays down that where malice is pleaded in an action against a public officer notice under section 461 need not be given. He relies particularly on the case of *Appu Singho v. Don Aron* [2] and *Abaran Appu v. Banda* [3]. In the former case it was held that it would be intolerable if the privileges conferred by the Civil Procedure Code on public officers acting in their official capacity were to be extended to public servants who act wrongly and for the gratification of private malice. In the latter case it was also held that a public officer who does an act maliciously in the pretended exercise of his authority cannot be said to be purporting to act as a public officer and is therefore not entitled to notice of action.

I am unable to find in the language of section 461 anything which requires a person bringing an action against a public officer to ascertain beforehand whether the act which he purported to do in his official capacity was *mala fide* or *bona fide*. All that the section attempts to do is to debar a person from instituting an action against a public officer " in respect of an act purporting to be done by him in his official capacity " until the expiration of one month next after notice as prescribed in the section has been given. If the action is in respect of an act purporting to be done by a public officer in his official capacity, then the prohibition in section 461 applies. The word " purporting " has been defined in the case of *Appu Singho v. Don Aron* (*supra*) as equivalent to " in pursuance of ", and in the case of *Abaran Appu v. Banda* (*supra*) as meaning " pretended to be done " or " intended to be done ".

[1] *1 C. L. R. 107.* [2] *9 N. L. R. 138.* [3] *16 N. L. R. 144.*

When construing a provision such as section 461, in the first instance, the expressions used therein should be given their ordinary meaning. The word "purport" means ordinarily "profess" or "claim" or "mean" or "imply". Where as in this case a public officer clearly in the exercise of his function as the Principal of a School has given a certificate to a pupil in accordance with the requirements of Government regulations, there is no doubt that the act is one that he purports to do in his official capacity. There is no other capacity in which he can give such a certificate. Clearly therefore the mental process whether it be malicious or otherwise which induced him to write the words "Extremely bad" against the cage "Conduct" is immaterial.

The appellant is therefore entitled to succeed on this preliminary point which learned counsel has placed at the forefront of his appeal.

It is sufficient to refer to only two of the Indian cases cited at the argument, namely, the case of *Albert West Meads v. The King* [1] and *Gill & another v. The King* [2]. In the former case it was held that a public servant can only be said to act or to purport to act in the discharge of his official duties if his act is such as would lie within the scope of his official duty. It was stated by Lord Morton of Henryton that the test is whether the public servant if challenged can reasonably claim that what he does he does in virtue of his office. In the course of his judgment in the latter case Lord Simmonds in interpreting the words "an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty" in section 197 (1) of the Indian Criminal Procedure Code stated :—

> "Their Lordships, while admitting the cogency of the argument that in the circumstances prevailing in India a large measure of protection from harassing proceedings may be necessary for public officials cannot accede to the view that the relevant words have the scope that has in some cases been given to them. A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus a Judge neither acts nor purports to act as a Judge in receiving a bribe, though the judgment which he delivers may be such an act ; nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office."

In the instant case there is no doubt that what the appellant did he did by virtue of his office.

The appeal is allowed with costs.

PULLE, J.—I agree.

Appeal allowed.

[1] *(1948) A. I. R. Privy Council 156.* [2] *(1948) A. I. R. Privy Council 128.*